UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:	)	
	)	
MICHAEL T. PARKER,	)	CASE NO. 01-64474 JPK
	)	Chapter 7
Debtor.	)	
**********		
TIMOTHY PAUER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ADVERSARY NO. 02-6066
	)	
MICHAEL PARKER,	)	
	)	
Defendant.	)	

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This adversary proceeding was initiated by the plaintiff Timothy Pauer's ("Pauer") complaint filed on April 4, 2002. The record discloses that service of process was properly made, and that the defendant/debtor Michael Parker ("Parker") appeared by counsel, who filed an answer to the complaint on May 9, 2002. On February 21, 2003, Pauer filed a motion for summary judgment, together with a short statement of material facts and a memorandum of law in support of the motion. The record establishes that Parker has not filed a response to Pauer's motion for summary judgment.

As asserted by Pauer in his complaint, and conceded by Parker in his answer, the Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334(b), 28 U.S.C. § 157(a), and N.D.Ind.L.R. 200.1(a)(2). As agreed by the parties, this matter constitutes a "core" proceeding as defined by 28 U.S.C. § 157(b)(2)(I).

Standards for Review of Motions for Summary Judgment

The procedural mechanism of summary judgment is provided by Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by B.R. 7056. The principal

standard to be followed by the Court in determining a motion for summary judgment is stated as follows in F.R.C.P. Rule 56(c):

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The inquiry that the court must make is whether the evidence presents a sufficient disagreement to require trial or whether one party must prevail as a matter of law. *Anderson v. Liberty Lobby*, 106 S. Ct. 2505, 2509-10 (1986). In deciding a Motion for Summary Judgment, the Court should not "weigh the evidence." *Anderson*, 477 U.S. at 249, 106 S. Ct. at 2510-11; *Illinois Bell Telephone Co. v. Haines and Co., Inc.*, 905 F.2d 1081, 1087 (7th Cir. 1990). However, "if evidence opposing a summary judgment is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 106 S. Ct. at 2511; *Trautvetter v. Quick*, 916 F.2d 1140, 1147 (7th Cir. 1990).

The moving party bears the burden of showing that there is an absence of evidence to support the non-movant's case; *Celotex Corp. v. Catrett*, 106 S. Ct. at 2548, 2554 (1986), i.e., the lack of a genuine issue of material fact. *Big O Tire Dealers, Inc. v. Big O Warehouse*, 741 F.2d 160, 163 (7th Cir. 1984); *Korf v. Ball State University*, 726 F.2d 1222, 1226 (7th Cir. 1984).

When ruling on a motion for summary judgment, inferences to be drawn from underlying facts contained in such materials as attached exhibits and depositions must be viewed in a light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 82 S. Ct. 993, 994 (1962); *See also, Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356, (1986) (All inferences to be drawn from the underlying facts must be viewed in a light most favorable to the nonmoving party); *Yorger v. Pittsburgh Corning Corp.*, 733 F.2d 1215, 1218 (7th Cir. 1984); *Marine Bank Nat. Ass'n. v. Meat Counter, Inc.*, 826 F.2d 1577, 1579 (7th Cir. 1987).

When a motion for summary judgment is made and supported by the movant, F.R.C.P.

56(e) requires the nonmoving party to set forth specific facts, which demonstrate that genuine issues of fact remain for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 106 S. Ct. at 1355; the opposing party may not defeat the motion by merely relying on the allegations or denials in its pleadings.

The ultimate burden of proof at the trial of this Adversary Proceeding is on the party seeking an exception to discharge, and that party bears the burden of proof as to each element. *Matter of Scarlata*, 979 F.2d 521, 524 (7th Cir. 1992); *In re Kreps*, 700 F.2d 372, 376 (7th Cir. 1987). *See also, In re Martin*, 698 F.2d 883, 887 (7th Cir. 1983), (§ 727 general discharge). In bankruptcy exceptions to discharge are to be construed strictly against a creditor and liberally in favor of the Debtor. *In re Scarlata*, 979 F.2d at 524, *supra, quoting, In re Zarzynski*, 771 F.2d 304, 306 (7th Cir. 1985).

As to the standard of proof, it should be noted that the Supreme Court in the case of *Anderson, et. al. v. Liberty Lobby, Inc. and Willis A. Carto*, 106 S. Ct. 2505 (1986) held that in determining whether a factual dispute exists on a motion for summary judgment, the court must be guided by the substantive evidentiary standards of the case that are applicable at trial. The standard of proof in a § 523(a) nondischargeability adversary proceeding is by a preponderance-of-evidence, rather than the more stringent standard of clear and convincing evidence. *See, Grogan v. Garner*, 111 S. Ct. 654 (1991).

Materials to be Considered by the Court

F.R.C.P. Rule 56(c) provides that the Court is to consider "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," in determining whether or not a genuine issue/genuine issues of material fact exist. N.D.Ind.L.B.R. B-7056-1 sets forth certain procedural requirements which must be met to properly present a motion for summary judgment to the Court for decision. Principal among the requirements of that rule is the submission of a "Statement of Material Facts."

In this case, Pauer filed a statement of material facts on February 21, 2003. No facts extrinsic to the record are presented by this document; rather, the factual premises for the summary judgment are exclusively those established by admissions made by Parker in his answer to Pauer's complaint. As set forth in Pauer's statement of material facts, the facts established of record for the purposes of Pauer's motion for summary judgment are the following:

1. Pauer was employed by Parker from on or about September 1, 1990 until on or about August 15, 2001 [complaint, ¶ 5; answer, ¶ 5].

2. Parker, as Pauer's union employer, withheld funds in the amount of $80.00 from Pauer's net pay portion of wages on a weekly basis for submission to a union vacation fund [complaint, ¶ 6; answer ¶ 6].

3. The funds so withheld were to be forwarded by Parker to Morris Associates, in accordance with the Local #692 Cement Mason Building Contract, attached as Exhibit "B" to the complaint [complaint ¶ 7; answer ¶ 7].[1]

The foregoing are the sole facts of record with respect to Pauer's motion. In paragraphs 4

[1]There is a significant threshold issue which cannot be determined by this record as to the plaintiff's standing to pursue the claim which he seeks to advance in the adversary proceeding. In order for the plaintiff to be able to advance his claims, there must be a debt owed by the defendant to the plaintiff himself. The term "debt" is defined by 11 U.S.C. § 101(12) to mean "liability on a claim". The term "claim" is defined by 11 U.S.C. § 101(5)(A) to be a "right to payment", and by § 101(5)(B) to mean a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment". Due to experience with union fund claims in bankruptcy cases, the Court is aware that certain claims for unpaid benefits are advanced, or "covered" by the union funds themselves, and not by the individual union members for whom payments were to be made by the employer. In many circumstances, the employee's ability to obtain the benefits provided by each of the union plans is not diminished if his or her employer does not make contributions to that fund on his or her behalf. If Pauer was credited with payments not made by his employer, Pauer lost nothing and there is no debt to him: the record does not negate this possible circumstance. Moreover, the record does not establish facts concerning the operation of the vacation fund which are sufficient to determine how a "debt" is owed to Pauer, rather than to a designated union fund. Based upon the foregoing, the Court cannot determine if Pauer has standing to advance any claim in this adversary proceeding, an issue which will be addressed at the preliminary pre-trial conference which will be set by a separate order.

and 5 of his statement of material facts filed on February 21, 2003, Pauer apparently asserts that other facts are established due to Parker's failure to expressly deny the averments of paragraphs 1 and 8 of the complaint. This assertion is incorrect: Rule 8(b) of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by B.R. 7008, specifically states the following:

> If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. [emphasis supplied]

Parker's answers to paragraphs 1 and 8 of the complaint fall expressly within the provisions of this rule, and thus no fact sought to be asserted by those paragraphs has been established for the purposes of the record to be considered by the Court on Pauer's motion for summary judgment.

Legal Analysis

Pauer's pleading proceeds upon plural premises under 11 U.S.C. § 523(a)(4) in seeking to determine Parker's indebtedness to be nondischargeable. The first of these is under the first clause of § 523(a)(4), i.e., that the debt is "for fraud or defalcation while acting in a fiduciary capacity." The second specific ground upon which the complaint is premised is that the debt is "for . . . larceny." However, in the memorandum which was filed contemporaneously with the motion for summary judgment, Pauer relies exclusively upon the first "prong" of § 523(a)(4); there is nothing in either the summary judgment motion itself, or in its accompanying memorandum which addresses the concept of "larceny" as a premise for nondischargeability. Consequently, Pauer's motion for summary judgment cannot be premised upon a theory of "larceny" and is restricted to the fiduciary relationship theory stated in the first clause of § 523(a)(4); *Edwards v. Honeywell, Inc.*, 960 F.2d 673, 674 (7th Cir. 1992).

The sole ground presented to the Court is the assertion that Parker's debt is excepted from discharge because it is a "debt . . . for fraud or defalcation while acting in a fiduciary

capacity" in relation to Pauer. The seminal case in the Seventh Circuit which defines the necessary elements for a "fiduciary capacity" under this statute is *In re Marchiando*, 13 F.3d 1111 (7th Cir. 1994). According to *Marchiando*, in order to fall within § 523(a)(4), the relationship between the "wronged" party and the alleged "fiduciary" must involve the imposition of "real duties in advance of the breach", i.e., a relationship that "has an existence independent of the debtor's wrong and a trust or other fiduciary relation that has no existence before the wrong is committed"; *Marchiando* at 1115. The critical element in a fiduciary relationship which falls within the provisions of § 523(a)(4) is a difference in knowledge or power between the fiduciary and the principal which gives the former a position of ascendancy over the latter; *Marchiando* at 1116. In *Marchiando*, the Court reviewed the relationship between a licensed seller of Illinois lottery tickets and the State of Illinois in the context of the nondischargeability of an indebtedness arising from the former's failure to remit proceeds from the sale of lottery tickets to the State, and held there was no fiduciary relationship under 11 U.S.C. § 523(a)(4).

In the Court's view, the instant case is nearly parallel to *Marchiando*. As in all "withhold and remit" situations – including even the deduction/withholding of FICA and income taxes for remittance to taxing authorities – the existence of a separate "trust fund," as a segregated amount of money, is purely a fiction. There is never a segregated "withheld fund", a trust res if you will. The purported fiduciary acts essentially as a collection agent for the entity to whom collected funds are to ultimately be remitted. In parallel with *Marchiando*, Pauer is in essence a lottery ticket purchaser who has directed that his money is to be remitted by the collecting agent Parker to a third entity with whom the collecting agent has a contract requiring that such remittance be made. As in *Marchiando*, Parker did not become a "fiduciary" in any sense of the term until he owed each pay period's wages to Pauer. Even less favorable to the plaintiff here is the fact that unlike *Marchiando* – in which the collecting agent had actually received monies from persons which were to be transmitted to the third party to whom he was obligated to remit those

monies – in the instant case, Pauer is not the source of the funds to be remitted to the union funds. Thus, in this case, there is not even a fund upon which one might impress some form of technical trust relationship.

Pauer seeks to bring himself within the special circumstances held to be a "fiduciary capacity" in *In re Frain*, 230 F.3d 1014 (7th Cir. 2000). In *Frain*, the Court found that there was a "fiduciary capacity" relationship under 11 U.S.C. § 523(a)(4) under the terms of a written agreement between a majority shareholder and two minority shareholders in a corporation. Because of the terms of that agreement, the Court found that a "fiduciary relationship" existed prior to the commission of the alleged wrong of Frain. The Court also found that Frain was in a position of "substantial ascendency" over the two minority shareholders, particularly with respect to the handling of a fund which was actually in existence as an identifiable res when it was misappropriated by Frain to the detriment of his fellow shareholders. That clearly identifiable fund does not exist based upon the record in this case.

This case involves the common situation in which a certain part of each paycheck's wages are to be remitted by the employer to third parties, sometimes taxing authorities, sometimes spouses to whom a child support obligation is owed, sometimes as in this case to union-implemented employee benefit funds. Pauer received the net portion of his wages on every payday, but a portion of the balance of his earned wages which he would never have personally received were not remitted to the entity which should have received that portion. The "debt" which Pauer seeks to determine as nondischargeable is actually wages which he would have received himself but for the assignment of a certain portion of them to the union fund. Let's assume now that instead of not having a portion of those wages remitted to the union fund, Pauer never received any wages at all for several pay periods. Under Pauer's theory, that portion of wages which he did not receive which should have been paid to the union fund are nondischargeable, even though Pauer himself never received any payment for the periods of work. To adopt that

position would be an incorrect interpretation of the Bankruptcy Code. It must be borne in mind that 11 U.S.C. § 507(a)(3) and (4) provide priority claims for debts arising from circumstances in which an employer does not pay an employee wages or other employment compensation, or does not contribute to employee benefit plans on behalf of employees to whom wages were to be paid. While Pauer's assertions may have given rise to a priority claim, they do not sustain an action for nondischargeability of a debt under 11 U.S.C. § 523(a)(4); *See, In re Bryant*, 73 B.R. 956 (Bankr. N.D.Tex. 1987).

Finally, even if one were to assume *in arguendo*, that the legal theory advanced by Pauer is sustainable, the record in this case would not sustain it. 11 U.S.C. § 523(a)(4) requires "defalcation" in terms of the fiduciary capacity between the parties. As noted above, the material facts in this case do not establish that funds which were to be forwarded to Morris Associates were not: the defendant did not admit averments of paragraph 8 of the complaint, and any fact of nonremission of funds is absent in this record.

For the foregoing reasons, the Court finds that the Pauer's motion for summary judgment is denied.

Dated at Hammond, Indiana on December 22, 2003.

J. Philip Klingeberger

J. Philip Klingeberger, Judge
United States Bankruptcy Court

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